BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARTHA CASTRO	)	
Claimant	)	
VS.	)	
	)	Docket No. 190,478
IBP, INC.	)	
Respondent	)	
Self-Insured	)	

ORDER

Claimant appealed Administrative Law Judge Pamela J. Fuller's July 20, 1999, Decision. The Appeals Board heard oral argument on December 15, 1999. Appeals Board Member Gary M. Korte recused himself from these proceedings, and Stacy Parkinson has been appointed to serve as Appeals Board Member Pro Tem in Mr. Korte's place.

APPEARANCES

Claimant appeared by her attorney, Thomas R. Fields of Kansas City, Kansas. Respondent, a qualified self-insured, appeared by its attorney, Gregory D. Worth of Lenexa, Kansas.

RECORD

The Appeals Board has considered the record listed in the Decision and the report of the January 19, 1998, independent medical examination conducted by Lanny W. Harris, M.D.

STIPULATIONS

The Appeals Board has adopted the stipulations listed in the Decision.

ISSUES

An Award was first entered by the Administrative Law Judge on December 23, 1998. That Award was entered without the Administrative Law Judge considering the deposition testimony of three witnesses - Bernard F. Hearon, M.D.; Edward J. Prostic, M.D.; and Michael J. Dreiling. All three depositions were taken before the last terminal date set for the party presenting the testimony. That Award was appealed by the claimant and in an Order dated July 14, 1999, the Appeals Board remanded the Award to the Administrative Law Judge to include those three depositions as part of the record.

In the July 20, 1999, Decision, that is the subject of this appeal, the Administrative Law Judge awarded claimant benefits for a 13 percent permanent partial general disability based on permanent functional impairment. On appeal, claimant contends she is entitled to a much higher work disability. Claimant argues the Administrative Law Judge erred in ruling Dr. Edward J. Prostic's deposition testimony was inadmissible because claimant utilized the unauthorized medical allowance to obtain a functional impairment rating in violation of K.S.A. 44-510(c)(2). With Dr. Prostic's deposition testimony included in the record, claimant contends she has proved she has suffered a substantial work disability.

In contrast, the respondent argues the Administrative Law Judge did not err in finding Dr. Prostic's deposition testimony was not admissible because claimant had used the unauthorized medical allowance to obtain a permanent functional impairment rating. But respondent also argues claimant's permanent partial disability should be based on a 6.5 percent functional impairment rating instead of the 13 percent rating. Additionally, the respondent contends the number of weeks claimant was temporarily and totally disabled should be reduced by seven weeks as stipulated by the parties. During those seven weeks, claimant was also receiving unemployment compensation.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the parties' arguments, the Appeals Board finds the Administrative Law Judge's Decision should be modified to award a work disability.

Findings of Fact

1. Claimant started working for the respondent in 1991. The parties stipulated to an accident date of March 14, 1994. On that date and until claimant's last day worked of May 20, 1994, claimant used a knife and a hook to trim short ribs and loin wings. These jobs required claimant to repetitively use her upper extremities.

2. Claimant developed swelling in both of her hands and pain and discomfort in her left shoulder while she was performing these repetitive work activities. Claimant informed her

supervisor about her problems and was sent to the respondent's nurse on numerous occasions between March 14, 1994, and May 20, 1994.

3. Finally on May 20, 1994, claimant was asked to trim loin wings and she refused because of the pain and swelling in her hands. At that time, she was taken to the respondent's nurse and then was sent home.

4. Claimant was sent home on a Friday and returned to the nurse's office as instructed on Saturday. She did not work that day but was instructed to return to work on Monday. On Monday, however, respondent decided to terminate claimant because she could no longer perform her job as the result of her injuries, and respondent was unable or unwilling to offer accommodated work. At that time, claimant requested medical treatment for her injuries and was sent to respondent's physician, Myron Zeller, M.D.

5. Dr. Zeller prescribed physical therapy but claimant did not improve. He then referred claimant to a local orthopedic surgeon, Guillermo Garcia, M.D.

6. Dr. Garcia diagnosed claimant with bilateral carpal tunnel syndrome and left shoulder subacromial syndrome. On August 5, 1994, Dr. Garcia performed a right carpal tunnel release. This was followed by a left carpal tunnel release performed on November 15, 1994. Then on March 31, 1995, Dr. Garcia performed a partial excision of the labrum and subacromial decompression of the left shoulder.

7. Claimant continued to have tingling, numbness, and difficulty in performing grasping type of activities. Claimant was referred to orthopedic surgeon Bernard F. Hearon, M.D., of Wichita, Kansas.

8. Dr. Hearon first saw claimant on December 18, 1995. The doctor's diagnosis was recurrent right carpal tunnel syndrome. After a positive EMG test showed moderately severe right carpal tunnel syndrome, Dr. Hearon performed an open right carpal tunnel release on April 8, 1996.

9. On July 10, 1996, claimant was released to full duty without restrictions. But claimant returned to see Dr. Hearon on August 14, 1996, for treatment of left index, middle, and ring trigger digits. Dr. Hearon did not related this problem to claimant's work while employed by the respondent. The last time Dr. Hearon saw claimant was on December 11, 1996. Dr. Hearon opined that claimant had no permanent functional impairment, no permanent work restrictions, and no job task loss as a result of her multiple work-related injuries and subsequent surgeries.

10. At claimant's attorney's request, she was evaluated and examined, on November 6, 1996, by orthopedic surgeon Edward J. Prostic, M.D. At the time of the examination, Dr. Prostic had reviewed claimant previous medical treatment records, x-rays, and EMG examination results. The doctor found claimant to have continued rotator cuff irritability of

the left shoulder, left carpal tunnel symptoms, bilateral grip weakness, flexor tendon nodules of multiple fingers, and a symptomatic dorsal ganglion of the right wrist. He restricted claimant from work activities involving repetitive forceful use of either hand and minimal use of left hand at or above shoulder height. Also, claimant should avoid forceful pushing or pulling with the left arm.

Dr. Prostic recommended additional surgery for claimant's left carpal tunnel syndrome and right ganglion. Other additional medical treatment was recommended in the form of steroid injections or decompression surgery for claimant's stenosing tenosynovitis. Vocational expert Michael Dreiling had interviewed claimant and developed a list of work tasks that claimant had performed in 15 years preceding her March 14, 1994, accident. Dr. Prostic was shown that list and applied the permanent work restrictions he had imposed to the list of work tasks. The doctor opined that claimant had lost the ability to perform 9 of the 13 work tasks for a 69 percent loss of claimant's ability to perform the work tasks.

11. At Dr. Prostic's deposition, respondent objected to Dr. Prostic's testimony on the basis that the $500 unauthorized medical allowance, paid by the respondent, had been used to obtain a functional impairment rating. If so, this violates K.S.A. 44-510(c)(2) and any medical opinion from Dr. Prostic would be inadmissible.

At the deposition, the parties stipulated the respondent had paid $500 as the unauthorized medical expense and claimant had applied the $500 to Dr. Prostic's bill. But the claimant had not received a functional impairment rating from Dr. Prostic as a result of the $500 payment. In March of 1997, claimant did request a functional impairment rating from Dr. Prostic. But the claimant paid for that report separately.

12. During the litigation of this case, because the parties failed to agree upon a permanent functional impairment rating, the Administrative Law Judge appointed orthopedic surgeon Lanny W. Harris, M.D., to perform an independent medical examination of claimant. Dr. Harris saw claimant on January 19, 1998. He also had the benefit of claimant’s previous medical treatment records for review. The doctor’s clinical impression was residual peri-articular fibrosis of the left shoulder, and postoperative bilateral carpal tunnel syndrome with residual pain and sensory deficit. Utilizing the AMA Guides to the Evaluation of Permanent Impairment, he assessed claimant with a right upper extremity functional impairment of 8 percent and a left upper extremity functional impairment of 14 percent. These functional impairment ratings were combined for a whole body rating of 13 percent. Dr. Harris imposed permanent work restrictions of no repetitive pushing, pulling, rotation, or overuse of the left shoulder. Also, Dr. Harris recommended that claimant reduce her repetitive grasping, gripping, and lifting with both hands.

13. While claimant was being treated for her injuries and before she met maximum medical improvement, respondent hired vocational expert Daniel R. Fischer to assist claimant in finding employment and obtaining a GED.

Claimant's attorney replied to Mr. Fisher's correspondence to claimant and said he did not allow medical management for his clients, but when claimant was released from treatment, if respondent still wished to provide a vocational rehabilitation plan, he would be available to discuss with the respondent such a plan at that time. Mr. Fisher closed the case in August 1995 because the claimant's attorney would not allow claimant to cooperate in the proposed vocational program at that time. Claimant also testified she did not want to attend classes in preparation of taking the GED examination because she wanted to stay home with her little daughter. After claimant met maximum medical improvement, respondent never offered any further vocational services.

14. After claimant was released from Dr. Hearon's care in 1996, her first job was babysitting at $70 per week starting sometime in the latter part of November of 1996 for about two or three months. She applied for five other jobs and returned to respondent on three different occasions requesting employment.

15. Finally, in August 1997, claimant started working as a cashier at a grocery store. She is able to perform this cashier job within her permanent work restrictions. At the time of claimant's July 13, 1998, deposition, claimant was working 29 hours per week at $5.60 per hour for a total of $162.40 per week.

16. Vocational expert Michael Dreiling testified by deposition and established that claimant was only qualified to perform entry level employment and a GED certificate would not significantly improve her ability to access the labor market.

17. The parties stipulated that the claimant received seven weeks of unemployment compensation after her last day worked of May 20, 1994. At the same time, claimant was also receiving weekly temporary total disability compensation.

Conclusions of Law

1. The claimant has the burden of proving by a preponderance of the credible evidence his/her right to an award of compensation and of proving the various conditions on which that right depends.[1]

2. The Administrative Law Judge found Dr. Edward J. Prostic's deposition testimony was inadmissible because it violated the provisions of K.S.A. 44-510(c)(2). The Appeals Board disagrees.

K.S.A. 44-510(c)(2) provides:

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[1] *See* K.S.A. 44-501(a) and K.S.A. 44-508(g).

> Without application or approval, an employee may consult a health care provider of the employee's choice for the purpose of examination, diagnosis, or treatment, but the employer shall only be liable for the fees and charges for such health care provider up to a total amount of $500. The amount allowed for such examination, diagnosis, or treatment shall not used to obtain a functional impairment rating. Any medical opinion obtained in violation of this prohibition shall not be admissible in any claim proceedings under the workers compensation act.

The statute does not prohibit the unauthorized medical allowance to be used to obtain permanent work restrictions, nor does it specifically prohibit the health care provider from giving an opinion based on those restrictions as to the injured workers loss of ability to perform work tasks.[2]

3. The record is clear that claimant employed Dr. Prostic to examine claimant and provide an opinion on relevant work restrictions and need for additional medical treatment. The doctor was specifically requested not to provide a functional impairment rating.

The only time Dr. Prostic saw claimant was on November 6, 1996. No functional impairment rating was contained in the doctor's report dated November 6, 1996. Dr. Prostic took a history from the claimant, reviewed previous medical treatment records, conducted a physical examination of claimant, imposed permanent restrictions as a result of his examination, and made treatment recommendations. His bill for those services was $535, and claimant's attorney paid $500 of that bill with the unauthorized medical allowance provided by the respondent. Thereafter, on March 7, 1997, claimant's attorney sent a request to Dr. Prostic to express an opinion on claimant's permanent functional impairment. In a report dated March 11, 1997, Dr. Prostic, without examining claimant again, expressed such an opinion. Claimant's attorney paid for this report separately and not out of the $500 unauthorized medical allowance. In addition, claimant did not request Dr. Prostic to express an opinion on functional impairment at his deposition, and therefore his functional impairment rating is not part of the record.

4. Nevertheless, respondent argues the statute is clear, if the unauthorized medical allowance is used to obtain a functional impairment rating, then any medical opinion from that health care provider shall not admissible in any proceeding under the act.

Although claimant obtained a functional impairment rating from Dr. Prostic, the rating was not paid for by the unauthorized medical allowance provided by the respondent. The claimant paid for the functional impairment rating separately. In this case, that functional impairment rating was never made part of the record in these proceedings. The Appeals Board concludes that claimant, if he or she so desires, may obtain a functional

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[2] *See* Stark v. Monfort, Inc. WCAB Docket No. 210,898 (August 1997).

impairment rating from an examining physician and pay for such a rating separately. The claimant can then choose whether or not to enter the functional impairment rating into the record and this would not violate the provisions of K.S.A. 44-510(c)(2).

5. K.S.A. 44-510e specifies that a claimant is not entitled to disability compensation in excess of the functional impairment so long as the claimant earns a wage which is equal to 90 percent or more of the pre-injury average weekly wage.

6. Here, the parties stipulated to the March 14, 1994, accident date. But claimant worked earning a comparable wage until May 20, 1994. Accordingly, during these 9.57 weeks, claimant is entitled to permanent partial general disability benefits based on a functional impairment rating. The Appeals Board concludes, as did the Administrative Law Judge, that the most credible functional impairment rating is the 13 percent opinion expressed by Dr. Harris, the independent medical examiner.

7. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

8. The wage prong of the work disability calculation is based on the actual wage loss only if claimant has shown good faith in efforts at obtaining or retaining employment after the injury. Claimant may not, for example, refuse to accept a reasonable offer for accommodated work. If the claimant refuses to even attempt such work, the wage of the accommodated job may be imputed to the claimant in the work disability calculation.[3]

9. Even if no work is offered, claimant must show that he/she made a good faith effort to find employment. If the claimant does not do so, a wage will be imputed to claimant based on what claimant should be able to earn.[4]

10. The Appeals Board concludes claimant did not make a good faith effort to find appropriate employment from the time she worked as a babysitter from the last week of November 1996 through January of 1997 and until she started working as a cashier in

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[3] Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

August 1997. Claimant testified she only looked for five jobs during that period of time. Five job contacts in six months simply does not constitute a good faith effort to find work.

11. The Appeals Board also concludes there is no restriction on claimant's ability to work 40 or more hours per week. Therefore, the Appeals Board finds the appropriate post-injury wage to impute to claimant in calculating work disability would be her current hourly rate of $5.60 times 40 hours per week or $224. Comparing the $224 imputed post-injury wage to the stipulated $411 pre-injury average weekly wage equals a 45% wage loss.

12. Claimant's work task loss is 9 of 13 or 69%. The Appeals Board concludes Dr. Prostic's work task loss opinion is more persuasive and credible than the zero percent task loss opinion of Dr. Hearon.

Dr. Hearon found claimant had no permanent functional impairment and no permanent work restrictions as a result of her multiple work-related injuries and her subsequent surgeries. Taking into consideration claimant's complaints plus the clinical findings after her surgical procedures, the Appeals Board finds it is inconceivable that claimant does not have any permanent impairment of function or permanent work restrictions. The Appeals Board finds this conclusion is supported by the fact that both Dr. Prostic and Dr. Harris, also orthopedic surgeons, found claimant was in need of permanent work restrictions because of the permanent residual affects of her injuries and surgeries.

13. As required by K.S.A. 44-510e, claimant's work task loss of 69 percent is averaged with her 45 percent wage loss resulting in a 57 percent work disability.

14. Claimant received seven weeks of unemployment compensation at the same time she was receiving weekly temporary total disability compensation. Therefore, the Appeals Board concludes claimant should be awarded 114 weeks of temporary total disability compensation instead of 121.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge Pamela J. Fuller's July 20, 1999, Decision should be, and is hereby, modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Martha Castro, and against the respondent, IBP, Inc, a qualified self-insured, for an accidental injury which occurred March 14, 1994, and based upon an average weekly wage of $411.00.

Claimant is entitled to 114 weeks of temporary total disability compensation at the rate of $274.01 per week or $31,237.14, followed by 9.57 weeks of permanent partial disability compensation at the rate of $274.01 per week or $2,622.28 for a 13% permanent partial general disability, followed by 170.55 weeks of permanent partial disability compensation at the rate of $274.01 per week or $46,732.41 for a 57% permanent partial general disability making a total award of $80,591.83.

As of April 20, 2000, the entire award of $80,591.83 is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All other orders entered by the Administrative Law Judge in the Decision are approved and adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this ____ day of April 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Thomas R. Fields, Kansas City, KS
Gregory D. Worth, Lenexa, KS
Pamela J. Fuller, Administrative Law Judge
Philip S. Harness, Director